

Public Defender News

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Save a Tree?

Read the latest edition before the paper copies hit the mailbox! You can even download it to your desktop!

If you would like to receive an email notification when the newest edition of this newsletter is available on OPD's website, please email cmdoyle@mt.gov and we'll take you off the paper mailing list.

Articles Wanted!

The deadline for the next newsletter is August 15. Your contributions, ideas, office news, questions, and/or answers from around the state are most welcome! Please send them to cmdoyle@mt.gov.

CHIEF'S CORNER

Greetings, Fellow Public Defenders,

While we wait for spring to arrive in Montana, I want to congratulate and thank all of you for your efforts to help bring us within budget as we close the 2007-2008 books. I suppose this is just the life of state workers. I doubt any state agency spends June rolling in money!

I have been working with the folks at Warm Springs to help control their numbers of patients. There has been a move to amend the statutes that deal with fitness to proceed and unable to conform commitments. I had some problems with the suggested changes as did the Warm Springs folks. Warm Springs does not believe their numbers from these type of commitments are problematic. I did agree with them that we would do several things to help control the numbers:

1. All attempts shall be made to do fitness to proceed exams at the local level;

2. When commitment under 46-14-312 is anticipated, that they be advised beforehand.

In my experience, it serves the client well to alert Warm Springs that a client is going to be coming to them under a 312 commitment. Usually, Warm Springs wants any mental health reports and access to the evaluator prior to the arrival of the client. If any of you have a case involving this type of commitment, please don't hesitate to call me if you need any assistance. I am always willing to help facilitate the placement.

Here's to a good summer for each of you. I am trying to get all around the state this summer and look forward to seeing each of you.

Keep up the good fight!

Randi



Lieutenant Governor John Bohlinger proudly presents an award to Chief Public Defender Randi Hood, this year's winner of the 10th Annual Excellence in Leadership Award for State Government. The award is given to individuals who exhibit outstanding leadership qualities, who recognize the value of women in the workplace, and actively encourage women to move forward and upward.

Did You Know?

State employees are entitled to discounts on a variety of purchases and services including:

- ◆ Apple and Dell computers
- ◆ AirTel, Alltel, Cellular One, Sprint and Verizon Wireless services
- ◆ Fitness programs including Weight Watchers, SnapFitness 24/7 clubs, and several Helena-area facilities
- ◆ Software, including ESET anti-virus, and coming in July, Microsoft Professional for home use for only \$20!

All this and more available by clicking on the "Benefits" tab on the MINE site!

OPD Central Office Staff

Randi Hood (rhood@mt.gov)
Chief Public Defender

Harry Freebourn (hfreebourn@mt.gov)
Administrative Director

Larry Murphy (lamurphy@mt.gov)
Contract Manager

Eric Olson (eolson@mt.gov)
Training Coordinator

Laura Wendlandt (drlaura@mt.gov)
Mental Health Consultant

Sandra Law (slaw@mt.gov)
Financial Manager

Teri Kelly (terikelly@mt.gov)
IT Manager

Barb Kain (bkain@mt.gov)
Human Resource Officer

Bonnie Martello (bmartello@mt.gov)
Administrative Support Supervisor

APPROPRIATION PROCESS

By Harry Freebourn, Administrative Director

An appropriation is sometimes referred to as the checkbook that an agency uses to pay its bills in order to fulfill its mission. As you know, the State of Montana has three branches of government: the executive, legislative, and judicial. Only the legislative branch can approve appropriations (the checkbook) for the State. However, the executive branch produces the budget for all three branches that is submitted to the legislature for its consideration. One important factor when producing a budget is the fact that by law the State must have a balanced budget. Therefore, revenue estimates must be produced for the budget period before appropriations for the same time frame can be set. In other words, the State can only spend the revenue that it expects to receive and nothing more. Where does our agency fit in this process? The Office of the State Public Defender (OPD) is an executive branch agency and only one of many agencies that compete for funding from the state.

What is the appropriation process? In January of each odd numbered year, the legislature meets to enact law and approve appropriations for the three branches of government. As mentioned previously, the legislature uses the budget that it receives from the executive branch as its starting point for this process. The next legislature is scheduled to meet to do this work beginning in January 2009. However, before the legislature convenes there is a lot of work to be done to produce a State budget. The budget process is referred to as the Executive Planning Process or EPP.

Here are the steps that OPD must go through to get an approved appropriation.

1. Estimate a base budget (usually the same dollar amount that we expended in the base year, with certain adjustments). The base year is FY 2008 or the current year in which we are operating (July 1, 2007 through June 30, 2008). Our base

budget includes payroll and operating costs. Payroll is estimated by determining the number of positions that exist as of a certain date in early July following the base year (this coming July). This date is referred to as the "snapshot" because it is as if a picture is taken of all of those individuals employed by the agency as of that date. The current salary on the snapshot date for each position is the salary that is placed into the base budget. Unfilled positions are funded at the entry rate of pay for that position's pay band. Operating costs are expenditures for non-payroll items like rent, travel, contractor payments, communication costs, etc. Some of these costs receive an increase for the rate of inflation (or sometimes deflation).

2. Expenditures over and above the base are requested in a decision package (this is a specific budget item that is decided upon separate from the base budget or any other decision package). These decision packages are generally for costs that did not exist for the agency during the base year. For example, if an agency believes that it needs to institute a file management function, it could ask the Governor's office and the legislature to fund costs related to the function (such as staffing and equipment). Decision packages are due in the Governor's Office of Budget and Program Planning (OBPP) the first week in May 2008.

3. The OPD base budget and decision packages must be approved by the Montana Public Defender Commission prior to delivery to OBPP. The Commission oversees the agency and must by statute approve its budget submission. The Commission can approve or deny any part of the budget, add to the budget, or change the scope or dollar value of any budget item. The Commission approved the budget and decision packages at their April 18, 2008 meeting.

4. OBPP reviews all budgets from all branches of government and all agencies, and they must by law produce a balanced budget. They usually undertake this balancing process between May and September. During this time frame agencies meet with OBPP to

(continued on page 5)

CONTRACTORS' CORNER

Spring has supposedly sprung, however, winter still has a foothold here in Butte. I hope that the weather in your area is allowing you to enjoy the outdoors. I'm yearning for the beach in my hometown on Long Island where the temperature today is 96 degrees. I have fond memories of that little town before the population tripled, back when gas was 35 cents per gallon and before Horace Stoneham moved my beloved Giants to San Francisco. Oh well. I love Montana.

Feel free to share your memories and if you don't object I'll include them in future columns.

I have decided to publish a new item I am calling The Most Entertaining Claim Award. You see, I have the honor of reading some 200+ conflict and non-conflict claims each month. Most are rather drab, filled with t/cs with client, omni, or oc with investigator. However, some of you have the talent to make the mundane humorous. This issue's Award goes to Bill Hunt, a contract attorney servicing the northern counties of Region 3. (Consult our webpage to find out where that is.) The following two entries are quoted from his claim:

- 1) "Tap dance before judge asking for continuance";
- 2) "Teach State how to conduct jury trial and not pick on innocent downtrodden."

Now, to the business part of this article. The Montana Public Defender Commission met on April 18, 2008 and considered revising the \$25 per month cost stipend. Several possibilities were discussed, but the Commission chose not to change the stipend at this time. Instead, Chairman Taylor suggested spending available funds on additional services for contract public defenders (such as Lexis and the upcoming brief bank). If you have suggestions as to how OPD can provide you with additional services or support, please email me at lamurphy@mt.gov.

Speaking of Lexis, many of you have taken advantage of OPD's offer to provide Lexis to you for FREE. We have to accumulate 50 prospective recipients for each allotment. We are currently accepting requests for our second allotment. If you are interested, please contact Cathy Doyle at cmdoyle@mt.gov.

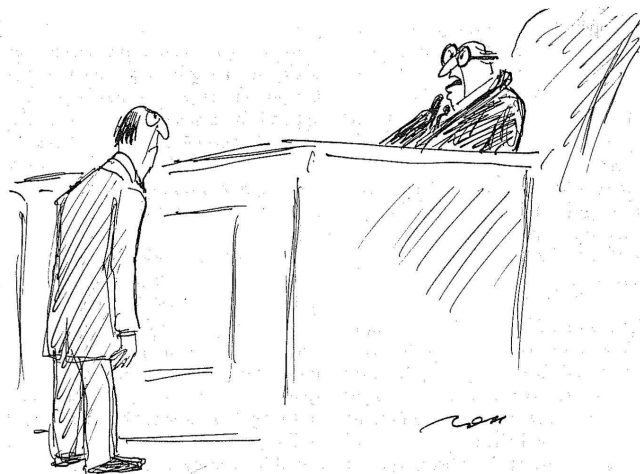
Under the housekeeping part of this article, I must remind you once again to use the appropriate claim form for your claims. There are new conflict and non-conflict attorney claim forms on the website. Be sure to use the one containing the column asking if the case is open or closed **and fill in that column**. The accounting staff will be returning your claims if you do not indicate the same. We are using these indicators for case management, and ultimately for the legislature.

I applaud you for abiding by the 45 day rule, which requires that you submit your claim within 45 days of the last day of the month you performed the service. Good job.

Finally, do not claim the \$25 stipend on both your conflict AND non-conflict claims, nor should you submit only a claim for the stipend without providing any service during the month. As my mom used to say, "The gall of some people."

Have a nice spring.

Larry



"And don't go whining to some higher court."

This month's Most Entertaining Claim Award goes to Bill Hunt for these entries:

- 1) "Tap dance before judge asking for continuance"
- 2) "Teach State how to conduct jury trial and not pick on innocent downtrodden"

OPD Briefing Attorneys

Eric Bunn, Billings
EBunn@mt.gov
256-6861

Jenny Kaleczyc, Helena
JKaleczyc@mt.gov
444-0104

Jordan Kilby, Missoula
JKilby@mt.gov
523-5140

Christina Larsen, Kalispell
ChristinaLarsen@mt.gov
751-6080

PERSISTENT FELONY OFFENDERS

Things You Should Ought to Know About the Persistent Felony Offender

by Brian Smith, Missoula PD Managing Attorney

A district court can sentence a defendant to a minimum of five years and a maximum of 100 years under Montana's version of the persistent felony offender (PFO) law. (The mandatory minimum rises to 10 years if the defendant is eligible under the statute after already having been designated a persistent felony offender.) The minimum sentence can not be suspended or deferred¹, except in limited circumstances.² It is not statutorily required to run consecutive if it is the first time a person has been designated a persistent felony offender. However, if sentenced as a second time persistent felony offender, the sentence must run consecutively to any other charge.³

To begin with, the persistent felony offender designation changes the maximum allowable punishment for the felony offense the defendant is charged with, essentially only qualifying the individual for a more severe punishment. The persistent felony designation is not a separate offense, charge or sentence.⁴ It is not reversible error for the sentencing court to characterize the persistent felony offender status as an enhancement or separate sentence as long as the total sentence does not exceed the maximum available under the persistent felony offender statute. Once the prosecutor gives appropriate notice of their intent to seek a persistent felony offender status, the maximum penalty for that criminal offense goes up to 100 years. Several important issues apply in the defense of persistent felony offender designations.

The persistent felony offender statute does not apply if the defendant was under the age of 21 at the time of the commission of the offense.⁵ An individual must have been convicted of a felony or convicted of an offense where the possible imprisonment is greater than one year.⁶ Although Montana does not have misdemeanors with potential sentences longer than one year, other states do have enhanced misdemeanor of up to two years. The persistent felony offender statutes can apply to defendants previously convicted while a youth but tried and convicted under a 206 Transfer⁷ as an adult.⁸

The timing of the prior conviction is important. The commission of the new offense must be within five years of the previous felony conviction OR the release from parole or confinement (or other commitment) as a result of the prior conviction.⁹ The release from probation date is not the same and probation is not the release from confinement or commitment.¹⁰ When determining the applicability of the persistent felony offender status be careful not to be misled by the discharge from probation date. For example, a person who receives a 10 year suspended sentence would only qualify for a persistent felony offender designation if the individual

committed a new felony within five years of the conviction date, even if they were still on probation for the original felony.

The prior felony conviction does not have to be proven to a jury.¹¹ The determination of application of the persistent felony offender is a sentencing decision for the trial court.¹² A constitutionally infirm prior felony conviction can not be used to support a persistent felony offender designation.¹³ The presumption is that a prior conviction is valid and the burden is on the defendant to show the prior conviction was infirm.¹⁴ An expired deferred imposition of sentence that should have been dismissed can not be used to support an enhanced penalty.¹⁵ Best practice, defense attorneys should move to dismiss any non-dismissed deferred imposition that is eligible for dismissal or run the risk of the Montana Supreme Court holding that the prior conviction makes the defendant eligible pursuant to the Court's reasoning in State v. Tomaskie which was not a PFO case.¹⁶

The persistent felony offender statutory framework requires that the State give notice of the intent to seek an enhanced penalty at or before the omnibus hearing.¹⁷ The deadline appears to be merely a suggestion and case law has largely made the deadline meaningless. The Montana Supreme Court has repeatedly held that the persistent felony offender statute is only a notice statute and has upheld filed notices as late as after trial.¹⁸ However, it was important in the McQuiston case, where the Supreme Court allowed the filed notice after trial, that the State had given the defendant notice in another manner prior to trial.¹⁹ In several older cases, including McQuiston, the Montana Supreme Court has upheld the PFO status request despite the State's failure to timely file notice. The Court in McQuiston relied on State v. Madera²⁰ where the court interpreted a previous version of the PFO statute that only required the State to file notice prior to the entry of a guilty plea or before trial.²¹ There are recent hints that this may only get worse.

In 2007 the Montana Supreme Court decided Miller v. Eighteenth Judicial District Court in which the court decided that an untimely notice of intent to seek the death penalty prevented the State from seeking the death penalty.²² The State had argued in Miller that the deadline for notice to seek the death penalty should be treated similarly to other deadlines, like notice of intent to seek a persistent felony offender designation, which the State argued required a showing of prejudice by the defendant. In responding to the State's argument in the Miller case, the Montana Supreme Court, in dicta, endorsed the idea that a defendant would be required to show prejudice from the late filing of the PFO notice pursuant to M.C.A. § 46-20-701 (2007).²³ Ironically the Court used the bedrock maxim that the plain meaning of the law controls to hold the State to its rule imposed duties. The requirement that the prosecutor file notice at or before the omnibus hearing seems very plain and easily understandable. There is no prejudice language contained in the statute.

When presented with a late filed notice of intent to seek a persistent felony offender status, counsel's objection should be specific. The Montana Supreme Court has denied review of

two of three attacks on the notice of the persistent felony offender, where only one of the attacks was preserved at the trial court level and ultimately was the only issue reviewed on appeal.²⁴ The notice of the persistent felony offender must be sealed until the time of trial or entry of the plea of guilty.²⁵ It probably does not meet with the requirements of the statute for the State to file the matter in court, on the record, in public, or to reference the status in an Omnibus form which is not sealed. When dealing with a notice of intent to seek a persistent felony offender status, an objection should be made that is specific as to the basis for the objection, including if the notice was late. Counsel should be aware that the Montana Supreme Court may require some showing of prejudice in the near future although the statute does not require it.

Finally, don't panic. Depending on the charge, the PFO may make no difference. A PFO notice on a sexual intercourse without consent, something that carries a maximum of 100 to life, makes no difference other than a fear factor for your client.

¹Montana Code Annotated § 46-18-502 (3)

²For exceptions to the mandatory minimum see Montana Code Annotated § 46-18-222

³Montana Code Annotated § 46-18-502 (4)

⁴*State v. Robinson*, 2008 MT 34, ¶ 16; *State v. McQuiston*, 277 Mont. 397, 408 (Mont. 1996)

⁵Montana Code Annotated § 46-18-502(1)

⁶Montana Code Annotated § 46-18-501 (1)

⁷Montana Code Annotated § 41-5-206

⁸*State v. Mainwaring*, 2007 MT 14.

⁹Montana Code Annotated § 46-18-501 (2)

¹⁰*State v. Smith*, 232 Mont 156, 755 P.2d 569 (1988), clarified in *State v. Montoya*, 1999 MT 180, 295 Mont 288, 983 P.2d 937 (1999)

¹¹*State v. Sanders*, 208 Mont. 283, 767 P.2d 1312 (1984)

¹²*State v. Smith*, 232 Mont. 156, 755 P.2d 569 (1998), 571-72; *State v. Vaughn*, 2007 MT 164

¹³*State v. Farnsworth*, 240 Mont. 328

¹⁴*Id.*

¹⁵*State v. Gladue*, 209 Mont. 235, 679 P.2d 1256 (1984).

¹⁶2007 MT 103, ¶¶ 16, 17, and 18.

¹⁷Montana Code Annotated § 46-13-108 (1)

¹⁸*State v. McQuiston*, 277 Mont. 397 See also *State v. Shults*, 2006 MT 100

¹⁹*Id.*

²⁰*State v. Madera*, 206 Mont. 140, 154, 670 P.2d 552, 559 (1983)

²¹*State v. Niederklopper*, 2000 MT 187, ¶ 11, 300 Mont. 397, 6 P.3d 448

²²*Miller v. Eighteenth Judicial Dist. Court*, 2007 MT 149, ¶ 32

²³*Id.*

²⁴*State v. Vaughn*, 2007 MT 164, ¶ 46, 338 Mont. 97

²⁵Montana Code Annotated § 46-13-109 (3)

APPROPRIATION PROCESS, continued

(Continued from page 2)

discuss budget items. OBPP can approve or deny any budget amount or any specific item or change the scope of any item or its estimated dollar value.

5. Once the budget is finalized by OBPP and approved by the Governor, it is packaged for delivery to the legislative staff in early November, giving the staff time to analyze it and prepare comments before the legislature convenes in January.

6. When the legislature convenes their staff provides them with the Governor's recommended budget. So that it may review any budget request or request for appropriation, the legislature's leadership appoints committees. The senate appoints members to Senate Finance and Claims Committee and the house appoints members to the House Appropriations Committee. These two committees select members that will form joint appropriations subcommittees. The subcommittees each have responsibility for specific agencies, and they hear testimony from the agency and the public about programs, budgets, and decision packages. The joint subcommittees approve, deny, or adjust budgets and recommend a budget for each agency to the Senate Finance and House Appropriations Committees.

7. Senate Finance and House Appropriations may conduct additional hearings on budgets. These committees can approve, deny, or adjust budgets.

8. The budgets then go to the full house and senate for approval, disapproval or adjustment.

9. Finally the house and senate form joint committees to work out differences in budgets and these joint committees can approve, disapprove, or adjust any budget.

Once the budgets are finalized they are distributed to each agency for use in the next biennium. The 2011 biennium consists of two fiscal years: FY 2010 (July 1, 2009 through June 30, 2010) and FY 2011 (July 1, 2010 through June 30, 2011).

The Central Office staff and the Commission are working hard to obtain appropriate funding for our public defender system, but as you can see, there are many potential obstacles along the way. Feel free to call Harry at 496-6084 with your questions as the process moves forward.

MENTAL HEALTH PROTOCOL

The Mental Health Protocol was established to assist public defenders in determining if a mental health evaluation might be beneficial to a client's defense, and then specifying the appropriate level of service. Dr. Laura Wendlandt, the OPD Mental Health Consultant, is a member of the defense team and is available to help identify the specific type(s) of service that will be of most benefit to the client. She can also help ensure that the chosen service provider has a Memorandum of Understanding on file.

This is a new process, and changes can be expected as the procedures are refined. Constructive criticism and suggestions regarding the Protocol process are welcomed. Send your comments to Dr. Laura at dlaura@mt.gov.

The most current information, including the Protocol, the fee schedule, pre-approval and supplemental approval forms are on the OPD website at publicdefender.mt.gov.

**Office of the
State Public Defender**

44 W. Park
Butte, MT 59701

Phone: 406-496-6080

Fax: 406-496-6098

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**Office of the State
Public Defender**

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publicdefender.mt.gov **]**

UPCOMING TRAINING EVENTS

These sessions are open to all public defenders, including contract attorneys. Check the website for additional training opportunities.

Lower Court Practices

July 10 - 11, 2008 (Helena)

Federal/State Defender Training

July 28 - 29, 2008 (Bozeman)

PFMA: The Psychology of Abuse

August 15, 2008 (Satellite)

OPD Investigator Conference

September 8 - 9, 2008 (Butte)

DOC Program Rules

September 16, 2008 (Satellite)

OPD Annual Training Conference and Staff Meeting

October 8 - 10, 2008 (Lewistown - Yogo Inn)

Contact Eric Olson (eolson@mt.gov or 523-5170) for details on satellite locations.